(2)

90-1007

No. _____

In The

Supreme Court of the United States

October Term, 1990

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

(GARY HASENSTAB, Real Party in Interest.)

Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Bank Act preempts claims of misrepresentation arising out of the hiring of an officer.

2. Whether the National Bank Act preempts tort causes of action unrelated to the term of an officer's employment.

3. Whether the National Bank Act preempts contract causes of action unrelated to the term of an officer's employment.

4. Whether the National Bank Act allows banks to breach express and implied contracts relating to the term of an officer's employment when the officer is terminated by someone other than the board of directors.

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BRIEF IN OPPOSITION

Real party in interest Gary Hasenstab respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal, First Appellate District, filed on July 17, 1990.

STATEMENT OF THE CASE

Real party in interest Gary Hasenstab is a securities broker. For eight years before joining Bank of America, he

enjoyed an increasingly successful career at Bateman Eichler, Hill Richards. He became the top producer of limited partnerships and in his last year earned approximately $200,000.

In 1985 and 1986 he was contacted by Terry Roussel, director of the Special Investment Group ("SIG") at Bank of America. Roussel made numerous representations to Hasenstab to induce him to work for SIG as a salesman of limited partnerships. These representations included statements that there were sufficient clients and product, that Hasenstab would earn $450,000-$550,000 in his first year, and that he would be employed a minimum of two years.

Based on these representations, Hasenstab left Bateman Eichler, Hill Richards and began work for SIG. During the nine months Hasenstab worked for SIG, there was virtually no product to sell. Instead of earning over $450,000, he earned only his base salary of $150,000. He also learned that many of Roussel's representations were untrue. Hasenstab was never told that his lofty title of vice president subjected his employment to the National Bank Act or that he was employed at the pleasure of the board of directors.

In December 1986 SIG was closed by Clyde Claus, an executive vice president. Hasenstab was terminated in February 1987 by vice president Brenda Thomas, allegedly at the direction of Claus, when he refused to sign a release. The board of directors did not participate in or ratify the termination.

SUMMARY OF ARGUMENT

The decision of the Superior Court is consistent with federal and state court precedent in requiring the board of directors, or an executive committee of the board, to make the decision to terminate an officer under the National Bank Act. In any event, since this case involves numerous contract and tort issues unrelated to the National Bank Act, the overall impact of any ruling by this Court will be minimal.

The decision of the Court of Appeal upholding the Superior Court consisted of one sentence and was unpublished. The decision therefore will have no precedential effect and does not justify this Court's involvement. Finally, the issues raised by the Petition are presently before the California Supreme Court so that any action by this Court will be premature.

REASONS FOR DENYING THE WRIT

A. The Trial Court's Ruling is Consistent with the Majority of Federal and State Court Decisions.

Several courts have ruled that an officer is not subject to the "at pleasure" provision of the National Bank Act unless the decision to terminate was made by the board of directors. In view of the drastic effect of the Act in allowing banks to breach contracts, both express and implied, these rulings are sound. The act was intended, not to give national banks the unrestricted right to breach its express contracts, but to allow banks to remove quickly any officer whose continued employment

"threatens immediate ruin to the institution." *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). Requiring the board of directors to make the decision to terminate ensures that the termination is so significant to the financial integrity of the bank that the decision is made by the highest level of management.

In *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378, 38 (6th Cir.1983), the court stated:

> The terms of section 24 (Fifth) require that officers be appointed and dismissed by a national bank's board of directors. Wiskotoni was neither appointed nor dismissed by the Bank's board. Wiskotoni was hired by . . . [the] president of the Bank. The decision to terminate was made by . . . the successor president of the Bank. . . . [T]he board . . . took no official action until . . . when on the eve of oral argument on this issue before the district court, it passed a resolution purportedly ratifying Wiskotoni's dismissal. . . . For these reasons Wiskotoni was not an officer of the Bank for purposes of the National Bank Act.

Wiskotoni was followed by the Oregon Court of Appeal in *McWhorter v. First Interstate Bank*, 81 Or. 132, 724 P.2d 877 (1986), which observed that the

> authority to hire and fire officers of national banks is *not* simply a matter of corporate organization; it is a matter which Congress has deemed sufficiently important to regulate by statute.

Id. at 135, 724 P.2d at 879. The court further noted:

> Section 24 (Fifth) explicitly confers the responsibility for the hiring and dismissal of officers *on the board of directors*. Other provisions of the

> National Banking Laws make it clear that Congress knows how to manifest its intent about what powers are exercisable only by the board and what powers may be exercised by subordinate entities. *See, e.g.*, 12 U.S.C. § 24, (Seventh) ("board of directors *or duly authorized officers or agents*"). [Emphasis added]. Defendant's argument rests on the premise that the board may divest itself of a duty that Congress has placed on it by enacting a by-law which makes no reference to that duty but which, if there were no statute, *might* be sufficient under general corporation law principles to confer hiring and firing authority on the president.

Id.

In *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989), a case relied on by Bank of America, the plaintiff was terminated by unanimous vote of the executive committee of the Board of Directors. The full board subsequently ratified that decision. The Ninth Circuit distinguished *McWhorter, supra*, by stating:

> there is no question that Mackey's firing was accomplished by the Board of Directors acting through its Executive Committee, . . . and not by the individual action of Pioneer's President.

Id. at 525.

In allowing an executive committee of the board to terminate officers with board ratification, *Mackey* provides a middle ground between the board itself and officers who have been delegated the responsibility to terminate. Although the executive committee is not the board itself, it is comprised of board members. Thus, at least some of the highest decision makers in the bank are participating in the decision.

Despite Petitioner's arguments to the contrary, the superior court's decision is consistent with *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989). The superior court denied Petitioner's motion for summary adjudication because there was no evidence that "the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board." (Pet.app.A.) Since *Mackey* was decided by the Ninth Circuit, the highest federal court in California, Real Party has been granted no more power by suing in state court than he would have had in federal court. Petitioner's claim that "officers discharged from the same bank in California would have different legal standards applied to their terminations depending upon the court in which they filed their claims" (Pet.6) is a gross distortion of the superior court's ruling.

B. The Petition Overstates the Significance of the Superior Court's Order.

Despite stating that the importance of the issues raised by the Petition cannot be overstated, (Pet.5), Bank of America proceeds to overstate the issues' importance to the point of absurdity. The superior court's ruling involved the Bank's right to breach employment contracts with officers under the National Bank Act. The court did not consider whether Hasenstab was an officer for purposes of engaging in bank-related business. Petitioner's statement that all business transactions requiring officer approval would be subject to rescission or ultra vires challenge, (Pet.7), is pure hysteria. By no stretch of the imagination did the superior court's ruling have any such effect.

To enjoy the benefits of the National Bank Act, a bank must comply with its requirements. Termination by someone other than the board of directors, or executive committee of the board, does not extinguish the employee's status as an "officer." It means only that the bank may not rely on the National Bank Act as a defense in the termination of the officer.

C. Since the Majority of Real Party's Claims Relate to his Hiring, rather than his Firing, the National Bank Act does not Apply.

Real party's complaint states tort causes of action for misrepresentation, fraud, deceit and intentional and negligent infliction of emotional distress. These causes of action relate to defendant's misrepresentations to plaintiff that his employment was guaranteed for a minimum of two years; that defendant would fully perform its obligations; that defendant would not deal with plaintiff arbitrarily, unlawfully, or in bad faith; that plaintiff could reasonably expect to earn commissions of several hundred thousand dollars; and that plaintiff could rely on defendant's cooperation and assistance. Defendant misrepresented the availability of product for plaintiff to market, the number and quality of clients interested in purchasing the product, and the current success of the Special Investments Group. In reliance on these representations, plaintiff was induced to leave secure employment to work for Bank of America.

Several courts have considered the question of whether a terminated officer's tort claims are also preempted when the National Bank Act is held to preempt

contract claims. Two state appellate decisions have allowed the employee to proceed on tort claims even though the contract claims were preempted by the National Bank Act. The tort claims in *Kozlowsky v. Westminister National Bank,* 6 Cal. App.3d 593, 86 Cal.Rptr.52 (1970) consisted of deceit and interference with contractual relations. Kozlowsky alleged that he had relied on a representation regarding the owner of controlling stock in the bank in leaving his former employment. Because the representation was a material fact which induced plaintiff to change his position, the court granted him an opportunity to prove it at trial. *Id.* at 598. *Kozlowsky* did not discuss in detail whether the tort claims were barred by the National Bank Act.

In *Rohde v. First Deposit National Bank,* 497 A.2d 1214 (N.H. 1985), plaintiff alleged tort claims for negligent misrepresentation and deceit arising out of an express promise of three-year employment. The New Hampshire Supreme Court held that there was no preemption under the Act for "tort claims arising out of [defendants'] conduct during the negotiation of such contract under theories of inducement or detrimental reliance." *Id.* at 1216.

The courts which have held tort claims preempted have done so with minimal analysis of the reasons therefor. In *Mackey v. Pioneer National Bank,* 867 F.2d 520 (9th Cir. 1989), the court dismissed plaintiff's tort claims for negligent misrepresentation and interference with business relationships, without discussing the underlying basis for such claims except to say that they arose "from his being forced to resign." *Id* at 522. In finding that there was no distinction to be made between tort and contract claims under the National Bank Act, the court stated that:

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

The present case also does not allege tort claims challenging wrongful dismissal. Instead, as in *Kozlowsky* and *Rohde*, Hasenstab's claims arise out of express representations made during the *negotiation* of his contract which *induced* him to leave secure employment. Thus, the claims concern petitioner's actions while hiring Hasenstab, rather than while firing him. As such, this case is distinguishable from *Mackey*, which concerned tort claims arising from Mackey's being forced to resign.

Allowing Hasenstab to proceed with his tort claims would not hinder the power of a national bank to dismiss an officer. A national bank would still be able to dismiss officers immediately to protect the safety and integrity of the bank. The bank's reasons for such dismissal would not be questioned. Rather, the bank's actions in hiring an officer would be questioned. If the bank committed fraud in inducing an officer to leave secure employment to work for the bank, the bank should be subjected to liability for that fraud. To rule otherwise would give national banks a license to commit fraud.

Thus, since the majority of the claims, as well as the evidence at trial, will concern Real Party's hiring and not firing, the overall impact of any decision by the Supreme Court will be minimal. It would be a waste of this Court's time to grant a writ of certiorari on a relatively insignificant issue in this case.

D. The Decision in this Case Affects the Litigants only, has no Precedential Authority, and thus does not Warrant Review by this Court.

The opinion of the Court of Appeal consisted of one sentence denying Bank of America's petition for writ of mandate. (Pet.app.B). There was no narrative included with the decision and it was unpublished. Thus, only the litigants will be affected by the opinion.

In addition, the issue of whether the board of directors of a national bank can delegate authority to terminate an officer is presently pending before the California Supreme Court. *See Wells Fargo Bank v. Superior Court,* 218 Cal. App. 3d 329, *depublished* at 267 Cal. Rptr. 49 (1990). The decision in *Wells Fargo* will resolve many of the issues raised in this case by petitioner and will have far greater impact on banks in California. It would therefore be premature for this Court to rule on this issue since the California Supreme Court soon may resolve the same issues presented by Bank of America's Petition.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied. The ruling of the superior court was consistent with federal and state decisions in requiring the board of directors, or an executive committee of the board, to make the decision to terminate an officer. In addition, since the majority of Real Party's claims arise out of his hiring, rather than his firing, any decision by this Court will have a minimal impact on this case. The opinion of the Court of Appeal was unpublished and will have no precedential effect. Finally, the issues raised by the Petition are presently before the California Supreme Court and any action by this Court therefore would be premature.

DATED: January 18, 1991

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